

Statement of Senator Orrin G. Hatch
Before the United States Senate
Regarding the Crisis in the Confirmation Process
November 21, 2013

Mr. HATCH. Today we face a real crisis in the confirmation process, a crisis concocted by the majority to distract attention from the Obamacare disaster and, in the process, consolidate more power than any majority has had in more than 200 years. This crisis was created by a majority that wants to win at all cost, for whom the political ends justify any means whatsoever. The two parts of this crisis are what the majority is doing and how they are doing it.

What the majority is doing is terminating the minority's ability to filibuster judicial nominees. If anyone thought that judicial filibusters were so easy that the minority has been doing it indiscriminately, they would be wrong. It is harder to filibuster judges today than at any time since the turn of the 19th century. And the truth is that Democrats are now terminating a practice that they created and that they have used, by orders of magnitude, far more than Republicans.

In February 2001, just after President George W. Bush took office, Democrats vowed to use "any means necessary" to defeat his judicial nominees. That is one promise Democrats kept. They pioneered using the filibuster to defeat majority-supported judicial nominees in 2003. In fact, 73 percent of all votes for judicial filibusters in American history have been cast by Democrats.

By this same point under President Bush, the Senate had taken 26 cloture votes on judicial nominees, more than twice as many as have occurred under President Obama. Under President Bush, 20 of those cloture votes failed, nearly three times as many as under President Obama. Democrats set a record for multiple filibusters against the same nominee that still stands today. They filibustered the nomination of Miguel Estrada, the first Hispanic nominee to the U.S. Court of Appeals for the D.C. Circuit, seven times.

Individual Democratic Senators took full advantage of the judicial filibuster that they now are terminating. The Majority Leader, the Majority Whip, and the Judiciary Committee Chairman together voted 82 times to filibuster Republican judicial nominees. In contrast, the Minority Leader, Minority Whip, and Judiciary Committee Ranking Member have together voted only 29 times to filibuster Democratic judicial nominees. For those same Democratic Senators to now take away from others the very tactic that they invented and used so liberally is beyond hypocritical.

The other part of this crisis is how the majority is terminating the judicial filibuster. The title "nuclear option" has been given to two methods by which a simple majority can change how the Senate does business. The first method has never been tried and can occur, if at all, only at the beginning of a new Congress. Because this method would actually change the Senate's written rules, it would be a public process involving a resolution and examination by the Rules Committee. Republicans considered using this method at the beginning of the 110th Congress but did not do so.

The majority today is instead using the second method, which requires only a ruling from whoever is presiding over the Senate. It is a pre-scripted parliamentary hit-and-run, over in a flash and leaving Senate tradition and practice behind like so much confirmation roadkill. This would be the wrong way to address even a real confirmation crisis, let alone the fake one created by the majority today.

The majority, it seems, just does not like the way our system of government is designed to work. I have been in the majority and the minority several times each, more than enough to experience that the rules, practices, and traditions of this body can annoy the majority and empower the minority. That is how this body is designed to work as part of the legislative branch. But the majority today wants to have it all. They are denying to others the very same tools that they used so aggressively before.

This year, the Senate has confirmed more than twice as many judges than at the start of President Bush's second term. We have confirmed nine appeals court judges so far this year, a confirmation rate exceeded only a handful of times in the 37 years I have served in this body. President Obama has already appointed one-quarter of the entire federal judiciary.

But that is not enough for this majority. In order to clear the way for winning every confirmation vote every time, Democrats set up a confrontation over nominees to the D.C. Circuit. They knew that the D.C. Circuit did not need more than the eight active judges it now has. How did they know? Because the very same standards they used in 2006 to oppose Republican nominees to that court told them so.

In 2006, Democrats opposed more D.C. Circuit nominees because written decisions per active judge had declined by 17 percent. Since 2006, written decisions per active judge have declined by an even greater 27 percent. In 2006, Democrats opposed more D.C. Circuit appointments because total appeals had declined by 10 percent. Since 2006, total appeals have declined by an even greater 18 percent. The D.C. Circuit's caseload not only continues to decline, but is declining faster than before.

In 2006, Democrats opposed more D.C. Circuit appointments because there were 20 judicial emergency vacancies and there were nominees for only 60 percent of them. Since 2006, judicial emergency vacancies have nearly doubled and the percentage of those vacancies with nominees has declined to less than 50 percent.

Judiciary Committee Democrats put those standards in writing in 2006. None of them, including the four who still serve on the Judiciary Committee today, have either said they were wrong in 2006 or explained why different standard should be used today. They have not done so because this about-face, this double-standard, is a deliberate ploy to create an unnecessary and fake confirmation confrontation.

I have to hand it to my Democratic colleagues because reality television can't hold a candle to this saga. Democrats first abandoned the arguments they used against Republican nominees to the D.C. Circuit in order to create a fake confrontation. Then they "solve" this confrontation by terminating the judicial filibusters that they once used against Republican nominees.

Mr. President, the filibuster has been an important – some would say a defining – feature of how this body operates for more than 200 years. It has always annoyed the majority because it empowers the minority. Both parties have used it, both parties have criticized it. But no majority has done what Democrats have done today. They have fundamentally altered this body, they have in the most disingenuous way done long term institutional damage for short term political gain. This majority wants everything to go their way, and will do anything to make that happen.

The majority created this fake confirmation crisis for two reasons. First, they want to stack the D.C. Circuit with judges who will approve actions by the executive branch agencies that President Obama needs to push his political agenda. Second, they want to distract attention from the Obamacare disaster. Well, Mr. President, I think this heavy-handed move will have the opposite effect on both counts. Just as both parties have used the filibuster to stop certain judicial nominees, both parties will use the absence of the filibuster to appoint certain judicial nominees. And now that the majority has crossed this parliamentary Rubicon, we can indeed focus again on what Obamacare is doing to American families. This is a sad day for the Senate, for the judiciary, and for the American people who want to see their elected representatives act on integrity and principle rather than use gimmicks and power plays.